Northern Ireland Assembly

Committee for Education

OFFICIAL REPORT (Hansard)

Education Bill: Informal Clause-by-clause Scrutiny

5 March 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Mervyn Storey (Chairperson)
Mr Danny Kinahan (Deputy Chairperson)
Ms Michaela Boyle
Mr Jonathan Craig
Mrs Jo-Anne Dobson
Mr Chris Hazzard
Mr Trevor Lunn
Miss Michelle McIlveen

Witnesses:

Mr Peter Burns	Department of Education
Mr Chris Stewart	Department of Education

The Deputy Chairperson: Chris and Peter, thank you very much, yet again, for coming in. In this session, we will consider each of the more straightforward clauses in turn and the proposals for amendments as set out in the summary table that has been provided. As necessary, I will ask the Department to remind the Committee of its evidence on the clauses and amendments. I will then ask members to indicate their views. If there is a consensus on a clause, the Clerk will update the table accordingly. The minutes from this meeting will indicate that there is informal agreement. If there is no consensus, I will ask members to set out their different viewpoints. The Committee will then informally determine its position. At this stage, no votes will be taken. The Committee will divide on a clause as necessary only during the formal clause-by-clause scrutiny. If that is clear, I will continue.

We previously informally agreed that we were content with clause 1. We heard advice on clause 2, and I propose that we leave further consideration of that clause until later. We also previously agreed that we would park clauses 3 to 9 and schedule 2, pending a response on the heads of agreement question. We also agreed to park clause 13, pending further information on the delegated nature of employment responsibility in schools.

At its previous meeting, the Committee agreed that it was content with clause 10, although issues relating to Irish-medium schools will be picked up as part of our consideration of clause 63.

That leaves us with clauses 11 and 12, clauses 14 to 69, schedule 1 and schedules 3 to 8 to formally scrutinise. I propose that we begin with clause 11. We will continue until 12.30 pm today and begin again tomorrow.

Clause 11 is entitled "ESA to employ peripatetic teachers". This clause defines a peripatetic teacher as a teacher who teaches:

"subjects in a number of schools",

or who provides "special educational provision".

The clause requires the Education and Skills Authority (ESA) to devise and revise a scheme for the appointment of such teachers. The scheme will set out:

"the number of peripatetic teachers employed by ESA",

and will ensure that such teachers do not teach in a grant-aided school unless boards of governors approve.

There was some discussion on clause 11 last week. I will ask the Department to explain the clause again and to comment on the commentary that Comhairle na Gaelscolaíochta (CnaG) provided.

Mr Chris Stewart (Department of Education): Thank you, Chairman. I think that you summed up the effect of the clause very neatly. You will appreciate that clause 11 is a relatively straightforward clause that would allow ESA to employ peripatetic teachers to teach in more than one school in much the same way as education and library boards (ELBs) do now. As you said, the clause places requirements on how ESA will do that and reinforces the need for boards of governors to have the final say on whether a peripatetic teacher is employed.

The suggested amendment from CnaG, which Trevor asked about last week, was that we should specify in the clause ESA's power to employ teachers who could teach in Irish. We feel that that is an absolutely laudable and reasonable aim, but we do not feel that the clause needs to be amended to provide for that. It is not necessary to specify that in legislation. It would be quite open and proper for ESA to employ peripatetic teachers with the ability to teach in Irish. It would equally be possible for Irish-speaking schools to do that themselves on a joint basis.

Members can perhaps compare clause 11 with clause 3, which I know they deferred their consideration of. Clause 3 is the overarching clause, which would mean that ESA would be the employer of all staff in all grant-aided schools. It is not thought necessary to specify in that clause teachers with Irish-language qualifications or, indeed, any other qualification. We see the appropriate place for that as the job description or person specification for particular posts. That could also, perhaps, be included in the employment schemes but not in primary legislation.

The Deputy Chairperson: Thank you. Are there any comments?

Mr Lunn: Do you think that there are enough peripatetic teachers who can teach in the Irish language to go around? What is the situation with the demand for teachers in the Irish-medium sector?

Mr Stewart: The only honest answer that I could give is that I do not know, Trevor. I think that we would need to consult CnaG and the Irish-medium sector and take a view from them about whether the supply is adequate. I infer, perhaps wrongly, from CnaG's interest in this clause that it perhaps sees that there is not a sufficient supply of teachers and that that is why it feels that the opportunity for peripatetic appointments is so important. Perhaps there are not enough Irish-speaking teachers to go around.

Mr Lunn: I am not in CnaG's confidence, but that seems to be the most likely reason why it has concerns about the clause. It is all very well having an order, but perhaps what CnaG is driving at is that there is a need to train more Irish teachers to meet the particular demands of that sector.

Mr Stewart: It may be right on that. However, again, specifying teachers who are qualified to teach in Irish in that way would not directly affect the supply situation. The encouragement and facilitation of people who have a sufficient ability in Irish as a language to enter the teaching profession would affect that situation.

Mr Lunn: I think that what they are probably getting at is that having Irish as a second language is not really a sufficient qualification to enable a person to teach in Irish-medium schools, where the entire setting is in Irish.

Mr Stewart: I think that that is right. I do not claim any particular personal expertise in immersion education. However, having engaged with CnaG down the years, I think that you are absolutely right. What it would say is that one of the real values of immersion education is not simply that lessons are conducted in Irish but that children, many of whom do not come from Irish-speaking households and, perhaps, do not speak Irish all the time outside school, are immersed in the Irish language throughout their school experience. All the day-to-day activities of the school in and around the classroom take place in Irish, and that is how they acquire, strengthen and develop richness of understanding. You are absolutely right. For that to happen, it is not sufficient for someone to be a teacher. It is not even sufficient for them to be able to deliver lesson plans in Irish. They need to be a fluent Irish speaker.

Mr Lunn: Yes. I suppose that there are two ways that we could clarify that. The Department could find out what the situation is with the number of Irish teachers compared with the demand, or I could ask CnaG what its point is.

Mr Stewart: We could certainly provide information to you on that. I have to say that it is still my view that, even if what we both suspect is confirmed, the suggested amendment would not make any difference.

Mr Lunn: It might put pressure on the Department to arrange for the training of more Irish teachers. If you put something into a clause, whether it is specified in the way that CnaG would like it or not specified in a way that you think is perfectly adequate, there needs to be enough teachers to satisfy demand. If we forget about Irish-medium education and see this as an all-encompassing clause, which it actually is, it depends on there being enough spare teachers, whatever the sector.

Mr Stewart: You will know that overall responsibility for the supply and demand of teachers is shared between us and the Department for Employment and Learning (DEL) but that it lies mainly on the DEL side. Given that this is, therefore, a cross-cutting matter, if a view were taken at Executive level that there is a need to legislate generally or for some particular aspect of teacher supply, our advice would be that you would need a bespoke provision. We would need to be absolutely clear about what the policy intention is, what the problem is that we are trying to remedy and then come up with a bespoke provision that would achieve that.

It is rarely a good idea to try to fix problems in passing by tacking a solution on to something else, and, honestly, I do not think that that would work in this case.

Mr Lunn: I am tempted to comment on that in the light of what is happening in the Assembly at the moment. However, I will not go there.

Mr Stewart: Let me assure you that I was not referring to anything in the Criminal Justice Bill.

The Deputy Chairperson: Thank you. We will move on.

Mr Hazzard: Thank you. Would the suggested amendment create any active duty on the Department to meet that supply need? You sort of touched on that already. Is an attempt being made to do that? Would it work?

Mr Stewart: It may do. I hesitate, because I think that it may work in an unhelpful way. The Office of the Legislative Counsel (OLC) often advises us to be very careful when we specify something or pick something out from a longer list, because that can sometimes have unintended consequences. If we were to make specific mention of Irish-speaking teachers, a court might look at that and say that there must have been some reason behind that, that the Assembly must have had something in mind or that the Assembly must have decided that it was more important to have Irish-speaking teachers than English-speaking geography teachers or something else. For that reason, we always need to be very careful about picking things out.

To give you an example, once or twice we explored with the OLC whether we needed to pick out particular instances of things that the power of direction in article 101 of the Education and Libraries (Northern Ireland) Order 1986 could be used for. He advised very strongly against it. He told us that, if we picked out particular things, a court may feel that that is all that we are allowed to use article 101 for, and that might then restrict our ability to use it elsewhere.

If I sound reluctant, it is simply for technical reasons. The policy question of whether there should be something to address the supply of Irish-speaking teachers is a matter for Ministers, this Committee and the Assembly. If there is a consensus that something needs to be done, our technical advice would be that it would best be done by a specific provision. We should know exactly what the problem is that we are trying to fix and come up with a specific provision to address it.

The Deputy Chairperson: Members, are we content with the definition of the term "peripatetic teacher"?

Members indicated assent.

The Deputy Chairperson: Are we content for ESA to devise and revise schemes for appointment, and are we happy with the assurance in the clause that those teachers will teach in schools only with the permission of the board of governors?

Mr Lunn: You ask whether we are happy with the definition. Where is the definition?

The Deputy Chairperson: It is at clause 11(2):

"In the Education Orders 'peripatetic teacher' means a teacher employed."

Mr Lunn: Yes. Sorry.

The Deputy Chairperson: OK. Are you happy?

Miss M McIlveen: Just for clarification, this is really just informal scrutiny, so at this stage, we do not have to declare whether we are happy or unhappy.

The Deputy Chairperson: So, we just leave it, I think.

The Committee Clerk: The idea of informal clause-by-clause scrutiny is that the Committee informally sets out its position. That means that, when we come to formal clause-by-clause scrutiny, if I know that the Committee is of a mind to support an amendment, I will have that amendment to hand and the Committee could then vote. So, it is essential that, at the informal clause-by-clause scrutiny, members indicate informally where they are on a particular clause, how they feel about particular amendments and whether they like them or not.

The Deputy Chairperson: What about if we wanted to reserve judgement?

Miss M McIlveen: It is my understanding that, as we move through the Bill, this is just an opportunity for the Department to provide clarification. Surely to declare at this stage is a little premature.

The Committee Clerk: No. The procedural advice that I give members is that, at informal clause-by-clause scrutiny, it is asked that members set out their position so that when we come to formal clause-by-clause scrutiny, as I said, I will have the amendments to hand — drafted, hopefully — on the issues that members feel are important and want to see in the Bill, as well as the changes that they want to make. So, it is essential that members set out their position.

The Deputy Chairperson: Can members not just say that they are not happy at the moment and that they want to reserve their judgement? That is what parties will be doing.

The Committee Clerk: I think —

Miss M McIlveen: I think that we will be reserving our judgement on quite a lot of the Bill.

The Deputy Chairperson: Exactly.

Miss M McIlveen: I thought that the purpose of the scrutiny's being informal was that, if issues were raised, they could be clarified as we moved through the Bill.

The Committee Clerk: The idea of the evidence sessions with departmental witnesses, writing them letters and getting legal advice, and so forth, was to answer all the questions that members had. As I think I indicated a couple of weeks ago, at this point, members should know where they are on each clause. If they choose not to set that out, that is a matter for members.

The report that the Committee produces is its advice to the Assembly. It is the Committee saying, "Here is what we think about clause 4." If members choose not to give an opinion on a clause, that is not particularly helpful for the Assembly, but I guess that parties could make up their own mind. That is the idea of the report that drops out at the end of the Committee Stage. If members are not prepared to indicate their positions, it would be helpful if they would indicate that, and the report that I write may be very short and not particularly useful to the Assembly. So, I ask members to bear that in mind and make a judgement on what they want to say.

Miss M McIlveen: This is informal, and we will still be returning to the Bill at a formal stage, so there will be a further opportunity.

The Committee Clerk: The Bill Office advises that if you want a particular amendment or have an issue that you are very concerned about, we really need to flush that out now so that when we come to formal clause-by-clause scrutiny, you can simply take a vote. Right now, I do not know how members would vote on most of the amendments in that summary table or on any of the clauses. That is the idea of informal clause-by-clause scrutiny. I do not need to say that again, because I am sure that you have heard me say it many times.

The Deputy Chairperson: I take that on board, but I think that there will be those of us who will want to reserve judgement.

The Committee Clerk: If members will set that out, that is OK. Sorry, I will stop talking now, but just to be clear: the end result of the Committee Stage is a Committee report in which the Committee gives its advice to the Assembly. If members choose not to give very much advice to the Assembly, that is a matter for members. I am content to write the report that you tell me to write, but what usually happens at Committee Stage is a report comes out the other end. The Committee says, "Clause 1 is good, but clause 2 is not so good, and we want to change it in this way." If you do not do that, it may be viewed that you are not giving particularly useful advice to the Assembly. However, that is a matter for members.

The Deputy Chairperson: We are on clause 11, and the first question that I was asking was whether members were content with the definition of "peripatetic teacher". I think that we were all happy with that. The second question was whether we were content for ESA to devise and revise schemes for appointment. I think that there may be a difference of opinion on that. Can I have some indication from anyone, or shall we just leave that in the air unanswered? What happens in that case? Will you just write it down as not clear?

The Committee Clerk: I will record that the Committee has reserved its position.

The Deputy Chairperson: Are we happy, then, that the Committee has reserved its position on the second point?

Members indicated assent.

Mr Hazzard: Excuse my ignorance, but are we going to go through this whole process reserving our judgement on everything, creating a mammoth workload problem at the end?

The Deputy Chairperson: I participated in the Committee Stage of the Planning Bill, and many things were held over. As much as people were willing to do was done in the Committee and other things were held to the end by parties, which came out with their own amendments at the last moment, when we dealt with them. I know that that is not how you want it to happen, but it is what happens, if I have it correct.

Are we happy with the assurance in the clause that the teachers will only teach in schools with the permission of the board of governors or are we reserving our position?

Mr Lunn: That is clear for clause 11(5)(c), yes.

The Deputy Chairperson: Are we all clear that we are reserving our position?

Members indicated assent.

The Deputy Chairperson: I wish to determine members' views on the clause and on CnaG's amendment.

Mr Lunn: I am sorry about this, but clause 11(5)(c) states:

> *" that a peripatetic teacher may not be employed ... without the approval of the Board of Governors".*

Why do we need that? In the context of the overall debate about employment — who employs and who has the day-to-day authority to employ staff — why do we need it?

Mr Stewart: It is to give effect, in every circumstance including this one, to the general policy commitment that the Minister has given that only the board of governors will decide on the hiring and firing in a particular school, and to ensure that no one will work in such a school without the say-so of the board of governors.

Mr Lunn: I am sure that that is clear through clauses 3 to 12, schedule 2, clause 13 and the heads of agreement. Why, then, is it in there? We constantly hear that the Bill should not state things that are not necessary or that overlap with something else. Therefore, why would that need to be there?

Mr Stewart: It is because peripatetic teachers are dealt with separately and have particular and separate employment arrangements. I think that the requirement for the approval from a board of governors stems from concerns expressed frequently down the years to the Committee by some stakeholders that the Bill might somehow include some mechanism for ESA to dictate to schools who their employees would be. The Minister never had the slightest intention of doing that but recognised that the concern was sincerely held. Therefore, he thought it important that, throughout it, the Bill should make absolutely clear that there is no mechanism whatsoever — for full-time single school employees, peripatetic teachers or anyone else — for ESA to dictate to any board of governors who will work in a school. The net effect of all the provisions is to make good on that policy commitment, and, as I have said before, that includes everyone from the school principal to the visiting music tutor. No one gets to work in a school without the approval of the board of governors.

Mr Lunn: That is a classic case of what I harp on about when we look for an extra provision to be put in the Bill that may not be absolutely necessary, and I am sure that the Bill drafter would run rings around me in discussing it. For instance, the CnaG amendment that wants to specify the requirement of Irish-medium education, the ones suggested by the integrated sector and ones by others. OK, we know that it is in the 1986 order, but we would like to see it brought up to date. This to me is a pretty classic case of a provision, the absence of which I am not quite sure what difference would be made, but it is perhaps there to satisfy a concern.

Mr Stewart: The answer to Trevor's question may address his concern. The CnaG amendment, if included, would make no difference to the position in law. However, the absence of the provision requiring the approval of a board of governors would make a significant difference in law: it would leave it open for ESA to impose a teacher or teachers on a school. Without that provision, I might be arguing and trying to persuade members that ESA would have no such intention, that it was not part of the Minister's policy and that it would never enter anyone's head to do so. Stakeholders would respond by saying, "Ah, but we don't trust the Department and we don't trust ESA. We would like a provision in the Bill to make sure that ESA can't do that." The Minister listened to those concerns and recognises that they are sincerely held, and that is why the provision is there. Unlike the CnaG amendment, however, it will make a difference in law.

Mr Lunn: We have constantly told the grammar schools in particular that they have nothing to worry about and that ESA cannot interfere. Once the school gets its scheme of employment and management set up, ESA cannot possibly interfere, unless the school breaches its own scheme or statute. The school's own scheme says that it is the employer of its staff. Surely, by implication, that includes temporary staff.

Mr Stewart: It includes temporary staff but not peripatetic staff.

Mr Lunn: Where does it say that?

Mr Stewart: It is the combination of this clause and clause 3. Clause 11 specifically makes ESA responsible, not just as the employer but as the body that makes the employment decisions. In this case, ESA is for peripatetic teachers who perform the role that, for every other member of staff, would be performed by the board of governors.

The Deputy Chairperson: I wonder whether we should be taking legal advice on that or whether we should be happy with what Chris said.

Mr Lunn: We are getting sound advice. I am not going to argue the point for ever.

Mr Stewart: We are at the disposal of members. I have to say that, if you had asked me which of the clauses might cause members most concern, I would not have picked this one out first.

Mr Lunn: OK. Thank you. Very good.

The Deputy Chairperson: We wish to determine members' views on CnaG's commentary on the clause. Do you want to reserve judgement on that as well?

Mr Hazzard: I am content.

The Deputy Chairperson: Is everyone content?

Mr Lunn: I will say that I am content, too.

The Deputy Chairperson: In what sense are you content? You are content that it is not part of the Bill?

Mr Stewart: I think that the member means that I have worn him down.

Mr Lunn: Yes. I want to see my wife and kids again.

The Deputy Chairperson: Are we content with what the Department is saying, and that it does not need to be included?

Members indicated assent.

The Deputy Chairperson: Let us move to clause 12, which is titled "Salaries, etc. of staff: administrative and financial arrangements".

The clause allows voluntary grammar schools and grant-maintained integrated schools, where they currently operate their own payment systems for salaries, to continue to do so, subject to agreement with ESA. The clause also allows such schools to opt in to payment arrangements controlled by ESA. Stakeholders commented on the clause, suggesting a number of different approaches. I will ask the Department to explain the clause and comment on each stakeholder comment. The Governing Bodies Association (GBA) suggested an amendment that was designated to retain the autonomy of some boards of governors in respect of the payment of salaries. The amendment removes the requirement for boards of governors of voluntary grammar schools to agree payment arrangements with ESA and to add a separate schedule setting out payment arrangements. I ask the Department to comment.

Mr Stewart: You have summarised the effect of the clause very neatly. The provision is intended to make good a policy commitment that the Minister gave, which was that we would maximise the autonomy of schools and, wherever possible, not interfere or change any functions that are currently carried out by schools. It is the case that voluntary grammar schools and grant-maintained integrated schools run their own payroll systems. We think that it would be more efficient and more effective if they were to opt in to central payment arrangements currently operated by the Department, which, in future, will be operated by ESA. However, the Minister gave a policy commitment that we would not

force schools to do so. Therefore, the clause allows for schools that currently run their own payment systems to continue to do so.

One of the things that has irked the voluntary grammar schools is the requirement for an agreement with ESA to do that. That is there simply for the technical reason that ESA is the employer and, therefore, in running a payroll system, a school is doing so on behalf of ESA. Therefore, there needs to be a formal agreement between the board of governors and ESA to do that. We see no difficulty whatsoever in such an agreement. That is the Minister's policy. ESA will be directed, if necessary, to reach such agreements with boards of governors. Those agreements will simply be the formal recording of the arrangement that is currently in place, and that will continue to be in place.

We think that the first of the amendments, which, I think, was proposed by the voluntary grammar schools, is unnecessary. It is also technically flawed to a significant degree. It suggests:

> *"The Board of Governors of a voluntary grammar school may, upon notice given to ESA issue payment in accordance".*

That, unfortunately, would require each voluntary grammar school to give ESA notice, each month, that it was going to make some payments. We do not think that that is a terribly practical arrangement. It would be much simpler to have one page of A4 on which the board of governors agrees with ESA that it will continue to run its own payroll system. It can then do so, unencumbered by interference from any source.

There are other proposed amendments that suggest that we absolutely should not allow —

The Deputy Chairperson: Chris, I will go through those, if everyone else is happy that I move on. The Association of Teachers and Lecturers (ATL), the Western Education and Library Board (WELB) and the Northern Ireland Public Service Alliance (NIPSA) suggested amendment b, which is designed to prevent schools, other than voluntary grammars and grant-maintained integrated schools, developing their own salary payment arrangements independent of ESA.

The National Association of Head Teachers (NAHT) and the Association of Controlled Grammar Schools (ACGS) suggested amendments c and d respectively, which are designed to allow all schools, not just voluntary grammars and grant-maintained integrated schools, to develop their own salary payment arrangements independent of ESA. Amendment e from NIPSA and amendment f from David Stewart would do away with the independent salary arrangements that are currently in place in the voluntary grammars and grant-maintained integrated schools. Those amendments would make ESA solely responsible for salary payments in all grant-aided schools.

Chris, can you comment on those, please?

Mr Stewart: Certainly, Chair. As members will see, there are a number of amendments, some of which are diametrically opposed in their effect. Our starting point, of course, is the Minister's and the Executive's policy position, which is that those schools that already run payroll systems should be able to continue to do so or to opt in to the central system, if they wish. However, there is no policy intention to extend that to other schools. Therefore, there is no opt-out proposed for the current set of arrangements. The amendment that would prevent an opt-out is unnecessary. The clause does not provide for that. It is already limited to those schools that already run their own payroll systems. Equally, the amendments that effectively propose doing away with the clause, would be contrary to the Minister's policy. It is his policy to allow schools to continue to operate their own systems.

I move now to the amendment that would open that up to all schools and introduce a more general opt-out. Again, that is contrary to the Minister's policy position. We do not think that that would be a sensible or feasible approach. I will illustrate that for members. The teachers' payroll system that is currently operated in the Department is for around 1,000 schools, so it is for most schools. It is operated by around 75 staff. We think that there is room for efficiency gains there. The payroll system could probably be run by fewer staff. If we were to allow an opt-out for all schools, that would be 75 staff spread out across 1,000 schools to run payroll systems. If I have done the maths correctly, that is 0·075 of a member of staff, potentially, for each school. Of course, those staff would have to follow that function. They would have to be TUPE-transferred out to the school. We do not think that many, if any, schools could run an effective and efficient payroll system on 0·075 of a member of staff, so we think that the centralised system is going to be much more efficient and much more effective. There is still room for more improvement, and we would encourage as many schools as possible to

opt in to it, but those that wish to remain outside are free to do so. However, it is not the Minister's policy to allow any other schools to opt out.

The Deputy Chairperson: Should voluntary grammar and grant-maintained integrated schools continue to make their own salary arrangements? Is it a mixed view or do you want to reserve judgement?

Miss M McIlveen: I think the issue is much broader than that. I think that we need to reserve our judgement.

The Deputy Chairperson: I was expecting that.

The Committee Clerk: Is the Committee prepared to indicate a view on any of the possible amendments? If the answer is no, the answer is no. Can members eliminate any of them? If it is a no, that is OK.

Miss M McIlveen: I could not do that at this stage.

The Deputy Chairperson: I am the same, I am afraid.

Mr Hazzard: What was that?

The Committee Clerk: If members wish to reserve their position, it would be helpful if they could look at the amendments that are in the table and indicate whether any of them are, clearly, no-brainers, or something that they do not support, do not need or are not interested in.

Mr Hazzard: I do not support any of them.

Mr Lunn: Chairman, do you want an opinion on them amendment by amendment?

The Deputy Chairperson: Yes.

Mr Lunn: That is fine.

The Deputy Chairperson: Whether it is a yes, a no or an abstention.

What about the suggested amendment from the GBA?

Mr Lunn: It is not necessary.

The Deputy Chairperson: I want to reserve my judgement on that.

Mr Hazzard: It is just the same. We heard GBA's comments about ESA creating more bureaucracy, yet what it suggests will create more bureaucracy every month.

The Deputy Chairperson: So you are a no.

Mr Hazzard: Yes.

The Deputy Chairperson: What about the suggested amendment from the Association of Teachers and Lecturers to prevent schools —

Mr Lunn: It is unrealistic. I am a no.

Ms Boyle: No.

The Deputy Chairperson: I want to reserve my judgement on that one as well.

What about the suggested amendment from the NAHT?

Mr Lunn: It is unrealistic. I am a no.

The Deputy Chairperson: I also want to reserve my judgement on that one.

The Committee Clerk: It has been indicated that a number of members want to reserve their position on every possible amendment to clause 12. I will record that accordingly.

Mr Lunn: Is that for all the amendments?

The Deputy Chairperson: For all the proposed amendments to clause 12. If may be that we will reach the same position on amendments to other clauses much quicker.

Miss M McIlveen: Chairman, I do not think that there is an issue with the amendments that have been proposed. We want to reserve judgement on clause 12 generally.

The Deputy Chairperson: OK. I think that that is probably the best way to put it. Thank you.

We will leave the GBA's suggestion that the arrangement requires further protections.

The Deputy Chairperson: Clause 13 is titled "Modification of employment law". The clause allows the Department to make regulations to modify employment law relating to employment schemes. We agreed to park the clause pending further information from the Department on the delegation of employment responsibilities. OK?

Members indicated assent.

Mr Lunn: Have we finished with clause 13?

The Deputy Chairperson: Yes. Unless you want to come back in.

Mr Lunn: I am surprised that we managed to deal with it that quickly.

The Deputy Chairperson: We agreed to park it some weeks ago.

Mr Lunn: So it is parked already?

The Deputy Chairperson: Yes.

Mr Craig: It is in the car park.

Mr Lunn: All right.

The Deputy Chairperson: Clause 14 is titled "ESA to provide or secure provision of training and advisory and support services for schools".

The clause places a duty on ESA to provide or secure training, and so forth, for boards of governors and staff in grant-aided schools, mostly free of charge. There was also a lot of comment on the clause, and I asked the Department to comment on that.

The sharing education programme (SEP) suggested amendments that were designed to promote shared education by requiring ESA to provide training and support on a shared basis, where possible. The Northern Ireland Voluntary Grammar Schools' Bursars Association (NIVGSBA) sought clarity on whether the training and support would be extended to nursery schools. The NAHT suggested changes that would reallocate the budget for training, and so forth, from ESA to schools.

I ask the Department to comment.

Mr Stewart: Thank you, Chair. We think that this is one of the most fundamental clauses in the Bill. It is certainly one of the most fundamental duties that ESA will have. One of its core functions will be to

provide or secure the provision of training and support for schools — governors and staff — with very much an increased emphasis on training and support for governors. That is in recognition of the very important role that they play and will continue to play, and of the need to provide better support, advice and training to them as they discharge those functions.

As we have said before, the intention is for what you might term a mixed economy of provision. Unlike education and library boards, ESA will not simply be the monopoly provider of such services. It will provide services and secure their provision by contracting with other providers, but it will also support schools or groups of schools in providing their own services or commissioning or procuring their own services.

So, there is a challenge for ESA. It has to ensure that it is responsive to the needs of its customers, the schools, by providing the services they need. If it is unable to do that, schools will increasingly look to provide those services themselves. If that were to happen, we would see a transfer of budgets from ESA to schools.

The Minister's intention is that we will see an effective, mixed economy of provision on the ground. ESA will, perhaps, provide some core common services that all schools would need, but schools will be able to supplement that by tailoring particular services or support that they and other schools feel could be provided more efficiently, effectively and locally.

Mr Kinahan: OK.

Mr Stewart: Would you like me to go through the amendments, Chair?

The Deputy Chairperson: I will go through them in a second. Are you happy for me to move on within the clause?

Mr Stewart: OK.

The Deputy Chairperson: The Transferor Representatives' Council (TRC) sought explicit reference in the Bill to the provision of support for religious education (RE). We received information on the Department's current responsibilities in respect of religious education. Members will recall that the duties in respect of RE lie largely with boards of governors. Chris, will you respond to that?

Mr Stewart: Certainly, Chair. I may risk Trevor's displeasure again by restating the Department's view that it is unnecessary to pick out support for RE in particular. It is a general requirement to provide support and training for the delivery of the entire curriculum. The Department is not convinced of the need to pick out RE or any other subject for specific reference. Again, to do so could have an unintended consequence. If a court was to look at that, it could conclude that there was some reason for giving RE special treatment over and above other subjects in the curriculum.

Mr Lunn: I agree.

Ms Boyle: I ask this question, because I do not know. Does the training and advisory support include personal development training for teachers, or is that a matter for schools?

Mr Stewart: It is certainly a matter for schools to decide what personal development training is required, but, yes, it would encompass that.

Ms Boyle: OK.

The Deputy Chairperson: Thank you. Are you happy if I move on?

Mr Stewart: OK.

The Deputy Chairperson: The Transferor Representatives' Council also sought assurance that ESA would not source training and support from large private providers. St Mary's University College suggested that the clause should explicitly indicate that continuing professional development for teachers should be via Northern Ireland's higher education sector. Members should note that the

Committee for Employment and Learning asked about that, and we gave due consideration to that submission. Will the Department respond to that?

Mr Stewart: Chair, the Minister does not feel that it would be appropriate to specify in the clause who the providers of training and support might be. Indeed, with reference to some of the amendments, we are not sure whether it would be possible to do that lawfully. I very much doubt whether an attempt to prohibit large suppliers, however they might be defined, from competing for the opportunity to provide services would be lawful. Quite possibly, that could result in some form of indirect discrimination.

Fundamentally, the Minister's policy is that it is not necessary to specify providers in the clause. That should be an operational decision for ESA and, indeed, for schools.

The Deputy Chairperson: OK. Thank you.

Members, are we happy with clause 14? Should ESA provide the training and support for school and governors, or should the budget be delegated directly to schools? Are there any comments?

My concern is how this will be forced on governors, because they are all voluntary. A statutory role will come in and that will be linked to inspections. That is where a lot of the concerns came from among the people whom we have talked to.

Mr Stewart: Chair, I do not think that the intention will be to force training on anyone. The clause is motivated much more by a concern that is regularly expressed by governors that there is not enough advice, support and training available to them, or that such training that is provided is not what they need. The Minister has absolutely listened to that, and he feels that the provision of a governors' support service is a priority now, even in advance of ESA. That is why he has asked education and library boards to move ahead to set that up in advance of ESA.

The Deputy Chairperson: That is absolutely the right way to go, tip-toeing down that line. So, should ESA provide the training and support for schools and governors, or should the budget for that be delegated directly to schools?

Miss M McIlveen: I am not convinced why an element of the budget cannot be kept back for schools.

The Deputy Chairperson: Yes, that is why both are linked into the same question.

Mr Stewart: The policy intention is that ESA would do that. We have not thought it necessary to specify that in the Bill. In order to give effect to the policy intention, ESA would have to do exactly that. It would have to be ready to work with schools to procure on occasion a service on behalf of schools, rather than schools providing it themselves, or support schools in providing procurement and, indeed, paying for the services that the school wishes to secure.

Miss M McIlveen: I am not sure that that amount of flexibility is reflected in the clause.

Mr Stewart: You are right, Michelle, there is not the specific requirement in the clause to do so. There is not a duty on ESA to set aside a proportion of its budget to pay for things that schools want. However, that certainly is the thinking that underpins the policy intention. But you are right, the clause is not specific in that regard.

Miss M McIlveen: I may want to look for a little more flexibility in relation to that.

The Deputy Chairperson: Does everyone feel the same way about that?

Miss M McIlveen: If that is the policy intention, I am not sure why it cannot then be reflected in the Bill.

Mr Lunn: Michelle is starting to sound like me.

Miss M McIlveen: Oh dear. That is worrying.

Mr Lunn: In terms of the high degree of autonomy that grammar schools will have, there is nothing in the Bill to stop them from accessing their own training and support and advisory services if they want.

Mr Stewart: As they currently do. Few, if any, voluntary grammar schools make use of the Curriculum Advisory and Support Service (CASS) provided by education and library boards.

Mr Lunn: So, the clause does not need to specify that there is a freedom for them to do that.

Mr Stewart: We would not need to specify the freedom to do that. I think that Michelle is making a different point, which is that members may wish to consider whether ESA should be required to hypothecate a proportion of its budget to do that.

Miss M McIlveen: It is the budget that we are now concerned about.

Mr Stewart: It would be unusual to specify budget decisions in legislation but not technically impossible.

The Deputy Chairperson: Could it be written in such a way that it is flexible, or do you think that it is written flexibly enough?

Mr Stewart: I am certainly of the view that the clause would provide for that. It would be possible to make it more explicit.

Miss M McIlveen: Chris, will you come back with a form of words that may be helpful for us in relation to that?

Mr Stewart: I would have to put that to the Minister. If he agrees, then, yes, we could do that.

The Deputy Chairperson: Is that a Committee view? Are we all happy with that?

Mr Lunn: Could I clarify what the request is? A proportion of ESA's training and advisory support budget should be allocated to whom? Individual schools?

Miss M McIlveen: It is to schools to allow them to have the flexibility to procure training that may be relevant to their schools as opposed to taking direct training from ESA.

Mr Stewart: If it would be helpful, what I would do first, rather than go straight to the wording of an amendment, is capture the policy intention in words that, if the Minister agrees them, we can bring back to the Committee. Then I can suggest how those may be captured in an amendment.

The Committee Clerk: We are asking the Department to come back with the policy intention, and members will take that forward, but there are other issues.

The Deputy Chairperson: There are more issues in the clause, I know. OK, so we note where we are on that. Should there be an explicit requirement in the Bill for support for religious education and/or shared resources and networking?

Mr Lunn: Surely that is already in the general provisions.

The Deputy Chairperson: It is already there. So, that is a no.

Mr Stewart: On that latter point, some of the suggested amendments that mention sharing or collaboration are deeply technically flawed. There is no definition of those terms. There is a very odd use of the phrase "where applicable", which is not defined in any way. If you see in a clause, "in relation to schools to which this clause applies", somewhere else in the clause or the Bill you will see a precise definition or explanation of that. Simply leaving the words "where applicable" hanging in the midst of an amendment would do great damage to the Bill.

The Deputy Chairperson: It did make me think about whether there would be any chance of having an interim report from the shared education body that was set up, because it is going to report after we have gone through the Bill.

Mr Stewart: It is in the process of finalising the report as we speak, but it may be another week or more before the Minister receives it.

The Deputy Chairperson: So, we could get something before we get through the Bill?

The Committee Clerk: I am not sure that the Department is promising to do that.

The Deputy Chairperson: Can we ask for that?

Mr Stewart: That would depend on the timescale of the advisory group. It may be as little as a week or it may be as long as two weeks before we see the final report. Thereafter, the handling is a matter for the Minister. I would have to take his view on it.

The Deputy Chairperson: Would the Committee be happy if we ask?

Mr Hazzard: It would do not harm to ask, if you want to ask.

The Deputy Chairperson: OK. As far as religious education is concerned, it was a no.

Should there be controls on the use of private sector suppliers or services? Should there be an explicit reference to higher education for teachers continuing professional development?

Mr Lunn: I am not quite sure where the transferors want to go with that. I have a lot of sympathy for some of the things that they say, but what is a large private supplier, and why would they want to disadvantage them in terms of tendering for training.

The Deputy Chairperson: The indication is that we cannot legally go for it.

Mr Stewart: I will not claim to offer definitive legal advice to the Committee, but my experience suggests to me that such a provision is quite likely to be unlawful.

The Deputy Chairperson: OK. So are we happy to put it down as a no from everyone?

Members indicated assent.

The Deputy Chairperson: We will move on to clause 15:

"ESA to provide library services to grant-aided schools and other educational establishments".

In line with departmental arrangements, the clause requires ESA to provide library services to grant-aided schools and other educational establishments. A stakeholder sought clarity as to what educational establishments, other than schools, will receive library services. Again, I will ask the Department to respond to that and to explain the clause and the provision of library services by ESA.

Mr Stewart: Thank you, Deputy Chair. I hope that this will be one of the more straightforward clauses. It is quite simply a continuity measure. It is to ensure that ESA will continue to provide what is usually known as the schools library service, just as education and library boards currently do. It stems from the time of the Libraries Act (Northern Ireland) 2008 and the establishment of the Northern Ireland Library Authority, when the policy decision was taken that the schools library service would nevertheless remain within the education field and not transfer out of that. Hence, this clause.

The requirement is for ESA to provide that service to grant-aided schools and all other educational establishments that it grant-aids. So, in answer to the question, it needs to do exactly what it says on the tin. If ESA grant-aids an educational establishment, it should make available to it the schools library service in respect of whatever that means. These days it means much more than simply providing books. It is providing books and opportunities to access computer-based information — not assessment, I hasten to add — and other online services.

Mr Lunn: Is there an example of an educational establishment other than a school?

Mr Stewart: A youth club or an early years provider.

The Deputy Chairperson: Are members content with clause 15 as drafted?

Members indicated assent.

The Deputy Chairperson: Clause 16 places a duty on ESA to secure provision of educational and youth services and facilities. The clause places a duty on ESA to provide adequate facilities for educational and youth services. The clause allows ESA to organise activities or make grants available, etc, in support of that. Additionally, the clause permits ESA to make by-laws in respect of those facilities. This clause drew some comment. The SEP suggested an amendment, which, like a number of the other amendments, was designed to promote sharing and collaboration. It would require ESA to develop facilities for educational and youth services on a shared and collaborative basis. I hand over to the representatives from the Department again.

Mr Stewart: Thank you. It is probably best if members see this particular clause as the companion to clause 2(2)(b), which members have parked. Clause 2(2)(b) includes the general duty on ESA to secure provision of educational and youth services. So, this is the companion piece to ensure that there are adequate facilities provided or secured for those services. Again, I remind members that one might describe "educational services" as shorthand for early years. The definition in the Bill is a little bit broader than that, but, generally, that is what we mean by "educational services". So, it contains the duty to ensure adequate facilities for youth services and early years services, and there are a range of powers there for ESA to perform that function, whether it is through establishing facilities itself, grant-aiding the provision of facilities by others and organising or otherwise supporting provision. So, there is a full range of tools in the box to ensure that ESA can carry out and satisfy that duty.

The Deputy Chairperson: Moving on, NIPSA suggested changes that were designed to prevent ESA entering into public-private partnership through a private finance initiative in order to secure new facilities. Is there any comment from the Department on that?

Mr Stewart: We understand NIPSA's view, but the Minister does not share it.

The Deputy Chairperson: The NAHT sought to remove the powers that would allow ESA to develop and enforce by-laws. It was felt that the enforcement of such by-laws would place unwelcome additional responsibilities on school leaders.

Mr Stewart: That is one where, if the Committee set its face against the provisions, the Minister would not be hugely concerned and might well be minded to go along with the Committee. Again, it is simply a continuity measure. There are similar provisions in the 1986 Order for education and library boards, and we are simply carrying them forward. In relation to the NAHT concern, it would have no effect whatsoever on school leaders because the by-laws sit within this clause for a reason — so that they relate to the duty to provide facilities for youth services and early years. The emphasis is on youth services. I do not think anyone would envisage a need for by-laws to regulate the conduct of preschool children. That would hardly be a priority for ESA, so the emphasis is very much on youth services.

Mr Lunn: Are you saying that the provisions are already in the 1986 Order, so it would not matter if clauses 5(a), 5(b) and 5(c) were not there?

Mr Stewart: They are in the 1986 Order, but they would be repealed if this clause went ahead. An alternative would be to simply leave the provision in the 1986 Order and amend that to point it towards ESA rather than education and library boards. The effect would be the same.

Mr Lunn: The only difference is that the provisions are for ESA instead of education and library boards?

Mr Stewart: Yes.

Mr Lunn: I will ask this obvious question: why is it there?

Mr Stewart: Simply as a continuity measure. In developing the policy and the Bill, we sought to carry over all of the functions of education and library boards, Council for Catholic Maintained Schools (CCMS) and the Youth Council, changing them where necessary but adding them to the functions of ESA. If the Assembly were to decide not to proceed with this provision, it would not fatally undermine the Bill.

Mr Lunn: Somewhere in the back of the Bill, there must be a clatter of technical amendments where "board" is changed to "ESA". I am sorry, but this is a constant argument that I seem to be having. Sometimes, things are carried forward and sometimes they are not. This seems to have been carried forward in a way that could have been dealt with by the stroke of a pen.

Mr Stewart: It could have been, if all that was required was that all references to "education and library board" be changed to "ESA". By and large, where that is all that is required, the draftsman's advice has been to do that by technical amendment. However, where a provision needs a bit more work than that, eventually it reaches a tipping point. That is always judged on the foot of the draftsman's technical advice: there is not really a policy reason for it. However, if he feels that it is reaching a tipping point where you are almost changing as many, if not more, words than you are leaving alone, his advice invariably is that it is best to repeal the clause or the provision completely and set it out afresh in a new clause.

The Holy Grail that all of us aspire to is a complete consolidation of all of the primary legislation, so that there is simply one education Act, where you capture all of the primary provisions. Maybe, someone who comes after Peter and I will be able to achieve that, but I am afraid it is beyond our scope for the present.

Mr Lunn: I am glad to see them adopting this approach. If they are taking the opportunity to modernise it slightly, or to bring it up to date, that is fine; that is good.

The Deputy Chairperson: What do we think about clause 16? Should ESA be required to provide facilities and activities connected to the educational and youth services? Do we believe that the Bill should require ESA to provide facilities, etc, on a shared basis?

Mr Stewart: The Department's view is that the suggestion is premature, given that the Minister has not had an opportunity to receive the report from the ministerial advisory group, and the amendments suggested are technically flawed.

The Deputy Chairperson: I got that. So, it is a no, at the moment. What is the Committee's view? Are you happy with that?

The Committee Clerk: There are a number of amendments around SEP. Is it the Committee's general position that it will not support those amendments? Or, is it not able to say?

The Deputy Chairperson: I would rather see if we can find out more about the future of shared education. The view is mixed.

Mr Hazzard: Even if we receive an interim report from the shared group, there will be no final policy decisions taken around it or on shared education until, at least, the summer.

The Deputy Chairperson: It might brief us as to whether we want to put amendments in.

Mr Hazzard: We might have an idea in our heads of what shared education is — I do not want to speak on behalf of the Department — but that is not going to make a difference to the definition of shared education in the Bill, or is it?

The Deputy Chairperson: I would rather hold my judgement on it.

Mr Stewart: As the Minister has set out, he is eagerly awaiting the report of the advisory group. He has said on a number of occasions that he sees the need to take that report and promote a debate

across civic society on the appetite for sharing, the particular approach to sharing and the forms of sharing that might be pursued. He has not at any stage ruled out amendments to this Bill on the foot of the report. However, I get a strong impression, from the way in which he has described his policy position, that he thinks that if there is a need for legislation for shared education, it would come in a different legislative vehicle. It would not come in this Bill.

The Deputy Chairperson: Are we happy with the clause?

The Committee Clerk: I asked members about the number of amendments from the SEP and a few others about sharing. What is the Committee's general view on that? Does it accept the Department's comments that, because there is no policy definition of what shared education is, these things should not be in the Bill? Or, does the Committee take another view? Or, is it reserving its position?

The Deputy Chairperson: What did we say at the beginning around clause 1?

The Committee Clerk: It was just about the name.

The Deputy Chairperson: I thought we had parked the definition of "shared". Or, did we merely say no? I am happy.

Miss M McIlveen: We are clear on the clause, as is drafted.

The Deputy Chairperson: Exactly, we are happy with it as drafted.

The Committee Clerk: But there is the general point about shared education. There are multiple amendments. Can the Committee set out a position? Do you want to support those? Or, do you want to take them as they come in each of the clauses?

Miss M McIlveen: I think that we will need to take them as they come, but we are also waiting for further information. I do not think that we can make a decision without that.

The Committee Clerk: Thanks to the member for making that clear. The Department has said that it does not expect there to be a policy definition in the immediate term, but the member has made her position clear.

Mr Stewart: I think that it would be deeply hazardous to attempt an amendment dealing with those sorts of matters, without a precise definition of shared education and such words as "collaboration", albeit the Committee might decide on one. I will illustrate the hazards of attempting to do so. The effect of amendment (a) in the table would be that ESA would be required to share or co-operate with some unnamed party, which is clearly not the intention. I think that the intention is for providers of youth services and early years services to share and collaborate, but that is not the effect of the amendment that is proposed.

Mr Lunn: Were we to accept that, or if something were to come forward to define "shared education" adequately, another wrinkle may come in the form of a further challenge that I am sure would be brought by the integrated sector — and prompted by me, I would think. *[Laughter.]*

Mr Hazzard: Trevor's point is a fair one. You feel that a bigger debate is coming on shared and integrated education, and this sort of precludes that.

The Deputy Chairperson: OK. Are members content with clause 16 as drafted?

Members indicated assent.

The Deputy Chairperson: Clause 17 is entitled:

"ESA to pay capital grants to voluntary and grant-maintained integrated schools",

and it transfers the Department's powers to pay capital grants to voluntary and grant-maintained integrated schools to ESA. Stakeholders did not comment on the clause. Will the Department explain it?

Mr Stewart: Certainly. Again, clause 17 is a fairly straightforward in its effect. The Department has existing powers to pay capital grants in respect of voluntary schools and grant-maintained integrated schools, and the clause transfers those functions and the relevant provisions from the Department to ESA. So it is a straightforward transfer of function.

The Deputy Chairperson: OK. What do members think about clause 17? Should ESA take on the role from the Department of paying grants to voluntary and GMI schools? If there is consensus, will you indicate that you are content with clause 17 as drafted?

Members indicated assent.

The Deputy Chairperson: Clause 18 gives ESA the power to establish controlled schools — nursery, primary, secondary or special schools. ESA will also be able to establish nursery classes in controlled schools that are not nursery schools. Stakeholders commented on this clause. NICIE sought clarification of the mechanism to be used by ESA to open new grant-maintained integrated schools, and it called for an amendment to allow new integrated schools to be opened. The TRC suggested an amendment that would require consultation with a relevant sectoral body before establishing a controlled school. The Department will explain the clause and to comment.

Mr Stewart: This, again, is a continuity measure or transfer of function. Education and library boards are today responsible for establishing new controlled schools. That responsibility will transfer to ESA. This is an example of a clause that required re-enactment in the Bill to set it out clearly. However, the core purpose of the clause is simply to transfer the functions. I am afraid that I may again incur Trevor's wrath here, but the integrated sector's concern is allayed in a provision that already exists in legislation, and there is not a need to re-enact it. The power to establish a new controlled integrated school will remain in article 92 of the 1989 order, and it required a fairly simple amendment to transfer that power from education and library boards to ESA. The OLC did not feel that there was a need to re-enact that.

The Minister is open-minded on the suggested amendment that ESA should consult with the relevant sectoral body. He would very much welcome the opportunity to consider the Committee's view on that. He can see a strong argument for a need to consult the relevant sectoral body before the establishment of any new school and not just controlled schools.

The Deputy Chairperson: Thank you very much. What do members think about clause 18? Are we content for ESA to have the power to open controlled schools?

Mr Lunn: Sorry, Chair, are you on the NICIE amendment yet? That would be a kind of reserved position.

The Deputy Chairperson: OK; so you want to —

Mr Lunn: I do not need to say it all over again, but I will. What is the difference between the requirement and non-requirement to re-enact article 92 of the 1989 order? There is no need to re-enact under clause 18, but under clause 17 it is a straightforward transfer to ESA of the authority to pay capital grants.

Mr Stewart: Those are matters on which we are in the hands of first legislative counsel. We are guided by his advice on when it is best to simply amend a provision in situ and when it makes more sense to repeal it and re-enact. It is a matter of technical drafting, and we see his expertise as the deciding factor.

Mr Lunn: The Departmental response says that the power will transfer to ESA. Is that on the back of the Bill?

Mr Stewart: It will be in schedule 7.

The Deputy Chairperson: Are we content that ESA has the power to open controlled schools?

Members indicated assent.

Mr Hazzard: See the TRC's suggested amendment that ESA "may, in consultation"? Is there a definition anywhere of "consultation" and what it at least has to be? Do you have any concerns that some might say that they were not consulted enough?

Mr Stewart: The Minister has indicated that he has an open mind in relation to the thrust of the amendment, but if he or the Committee decided to proceed with it we would offer advice on how it might be constructed. I think we would construct it differently. We would not use a formulation like "may, in consultation with", because that is not clearly enough defined. It would be much more likely to be couched in terms of a requirement on ESA, before establishing a controlled school, to consult the relevant sectoral body. That is much more clearly understood. The role of ESA there would be fairly clear.

The Deputy Chairperson: When we get to the other end of that, how do we define a "relevant sectoral body"? Would it have to be a recognised one?

Mr Stewart: "Relevant sectoral body" actually is defined in clause 63. It is a defined as a body that appears to the Department to represent schools of a particular description. In this case, given that the Minister is absolutely committed to the establishment of a sectoral body for controlled schools, I think the choice will be fairly clear. The requirement would simply be that, if ESA had a proposal to establish a new controlled school, before doing anything with that proposal it would consult the sectoral body.

The Deputy Chairperson: I was thinking more of voluntary grammars, because there is a debate as to whether he recognises them.

Mr Stewart: There is an issue there. If the suggested amendment was to be applied more generally to any type of school then the caveat to that would be "if there is a relevant sectoral body".

The Deputy Chairperson: Should this require consultation with the relevant sectoral body in respect of schools generally? Are we all agreed on that?

Mr Lunn: Are we agreeing that, in principle, we think there is some merit in the TRC's amendment? Is that what we are saying?

The Deputy Chairperson: That is what I am asking. Are you?

Mr Lunn: Yes.

Members indicated assent.

The Deputy Chairperson: Is an amendment required in respect of integrated schools?

Mr Lunn: Of course it is.

The Deputy Chairperson: You are reserving your position? OK. What is everyone else doing? Are you all happy? Is an amendment required in respect of integrated schools? It is amendment C — the NICIE amendment.

Mr Lunn: I do not doubt that it is already provided for in existing legislation, but it is not very clear. It would be a good opportunity for their mechanism if such a thing could be drafted or provided. It is kind of a reserved position again.

Miss M McIlveen: I am not sure that it is necessary.

The Deputy Chairperson: We are content with clause 18 as drafted or we wish to amend it. We are happy with the answers on that.

The Committee Clerk: Yes, the Committee is reserving its position on the amendments, so we cannot answer the question.

Mr Danny Kinahan: Clause 19 deals with the responsibilities of ESA in relation to controlled schools. This clause makes ESA responsible for maintenance of school premises, providing and replacing equipment, employing all staff and meeting the cost of all such things as may be necessary for the carrying on of a controlled school. The Sharing Education Partnership put forward an amendment, like a few others, which is designed to promote collaborative partnerships by requiring ESA to encourage partnerships between schools of all types. Has the Department anything to add in respect of that clause and the proposed amendment? In particular, would the clause prevent controlled schools from undertaking their own procurement, etc, independently of ESA?

Mr Stewart: I think perhaps that latter point is maybe more in clause 20, is it?

Mr Kinahan: We can answer —

Mr Stewart: Clause 19 is important, and it marks out one of the major changes brought by the Bill, which is a very different position for controlled schools, and a very different relationship with ESA to what they currently have with education and library boards.

The responsibilities of ESA are set out there. If there is a ring of familiarity about them to members, that is because they are very similar to the responsibilities that an education and library board currently has, and ESA will have in due course, in relation to maintained schools. In fact, they are almost identical. Again, that is to give effect to the Minister's policy intention, which is that in every respect, other than ownership of the land and buildings, the relationship between ESA and a controlled school will be the same as the relationship between ESA and a maintained school. Hence, it is necessary that that relationship be captured in a provision that sets out clearly the duties that ESA will have. That is the purpose of clause 19.

As to the proposed amendment, in addition to what I might term, if it is not being disrespectful, "the usual problems" with that type of amendment, there is another one, which is that, quite simply, it seems utterly unconnected with the purpose of the clause.

Mr Lunn: Clause 19(c) reads:

"ESA is responsible for ... employing, in accordance with section 3, all teachers and other staff".

We have not exactly nailed down clause 3, because we have not been able to discuss it because we are waiting for advice from another quarter. This is in relation purely to controlled schools, and perhaps the argument about clause 3 will centre more on the voluntary grammars, but there is a tide of opinion coming from the controlled schools that some of them would like to have more control of their own employment affairs. So, I am not quite sure how we can agree clause 19 without further discussion on a couple of other clauses.

The Deputy Chairperson: Do you want to withhold —

Mr Lunn: I think that we would be wise to do so. It is not just my personal view.

The Deputy Chairperson: I agree with you.

Does clause 19 mean that every single little thing that they have to buy will have to go through the Department, whether it is a light bulb, a new lock for a door or —

Mr Stewart: No, absolutely not. Neither this clause nor clause 20 has that effect on procurement. In relation to capital procurement, we would certainly strongly encourage all schools to do that through ESA, which will be the centre of procurement expertise and have a full range of professional staff with the expertise to do that. In relation to the procurement of other goods and services, equipment, etc, there will be no requirement on any school to procure through ESA. Again, we might encourage schools to look carefully at doing so but if a school, whether controlled or otherwise, feels that it has the expertise within the school to procure, it is free to do so.

Mr Lunn: Could Chris comment on clause 19(c) and the employment situation?

Mr Stewart: You are absolutely right, Trevor, in that, because this clause is explicitly linked to clause 3 and joins controlled schools to the employment arrangements in clause 3, if the Committee has not yet agreed on its position in relation to clause 3, then yes, it would be unusual, I suppose, to agree clause 19 until it had settled that.

Mr Kinahan: Is the Committee content with clause 19 as drafted, or does it wish to amend it or reserve?

Mr Lunn: We have to reserve.

Mr Kinahan: Are Members happy to reserve?

Members indicated assent.

Mr Kinahan: Let us move to clause 20,

"ESA to contract for certain works".

This clause gives ESA the power to enter into contracts for the provision of alterations to school premises. The contract may be public-private partnership (PPP) or traditional procurement where the contract is between ESA and the contractor, or maybe between ESA and the trustees of a board of governors of a voluntary or grant-maintained integrated school. There was some commentary from GBA and Inst. They suggested amendments that would limit, or disapply in some cases, ESA's authority to enter into contracts relating to premises in voluntary or grant-maintained integrated schools. Again, I will ask the Department to comment.

Mr Stewart: The purpose of the clause is to provide ESA with the core function of procuring capital development and entering into the necessary contracts. It is permissive. A lot of the concerns that were put to the Committee were based on the interpretation that this somehow gave ESA the power to enter into capital development without the agreement or permission of a school. That is absolutely not the case; nor do we think that that would be possible in practice. It would, in theory, be possible for ESA to enter into a contract with a builder to carry out works on a particular school. However, if it did not have the permission or agreement of the school, when the poor builder turned up to begin digging the foundations, they would simply be turned away at the gates of the school because ESA will not own voluntary schools and cannot compel any voluntary school to accept or undertake any capital development that it did not wish to.

We did not, and still do not, feel that it is necessary to specifically rule that out in legislation. It stems directly from the ownership of the schools and the premises by their trustees or boards of governors. The clause is purely permissive; it is to give ESA the power to enter into those contracts. It does not give ESA a monopoly, and it is not the Minister's intention that schools will be compelled to procure capital development through ESA. If they wish to procure capital development themselves, they will be free to do so, provided that they can convince ESA and the Department that they have the wherewithal and expertise to do so.

The Deputy Chairperson: Would it not be better to put "with permission" or to reword it?

Mr Stewart: It would be technically possible to do that. I suspect that, if we sought that, legislative counsel would advise me that it would be unnecessary because nothing in the clause affects in any way the rights of landowners. It would be technically possible to include something to give effect to the amendment suggested, although perhaps not those particular words.

Mr Lunn: This is not directly related, but on the RBAI suggested amendment concerning voluntary category B schools, those two schools are in a unique position. Are they precluded from asking the Department to contribute to capital expenditure?

Mr Stewart: No.

Mr Lunn: So they could, at some time, if they wanted to, because they thought that they were overstretching themselves, actually come to the Department or ESA for —

Mr Stewart: They could. As the law presently stands, that would have another effect that might strike you as unusual. There is a link between the percentage of capital grant that is provided and the composition of school boards of governors. In essence, every voluntary school except the two category B schools entered into agreements with the Department. In return for access to capital funding, they gave to the Department the right to nominate a certain proportion of their boards of governors. If the two category B schools wanted access to capital grant, they would have to enter into such an agreement with the Department, which would make a slight change to the composition of their boards of governors.

Mr Lunn: They would stop being category B, would they not?

Mr Stewart: They would stop being category B.

The Deputy Chairperson: Are we content to allow ESA to have the power to enter into contracts for the alteration of school premises? Does ESA need that power? Does the clause permit ESA to undertake works on premises that are vested in ESA or not without the agreement of the relevant board of governors? We have heard the opinion. Members, do you want to indicate whether we are content with clause 20 as drafted? Do we want to get it amended?

Mr Lunn: Content.

Mr Hazzard: Content.

The Deputy Chairperson: I feel that it should be amended.

Mr Stewart: The Department is slightly bemused by the notion that schools would be concerned that ESA might march in and build a new school against someone's wishes. It is not usually what we get criticised for.

Mr Lunn: Command and control.

The Deputy Chairperson: I understand that.

Mr Stewart: It is more usually letters about the lack of new schools that the Minister receives in his postbag.

Miss M McIlveen: I am curious as to how you think that it should be amended, Chair.

The Deputy Chairperson: I do not know. I need to go away and have a think. I just know that it is the protection they want. I know exactly what Chris has said — that it cannot do it.

Miss M McIlveen: Is it particularly around voluntary grammars?

Mr Stewart: It would actually be the case in relation to all schools other than controlled schools. In theory, ESA, as the owner of controlled schools, could go against the wishes of the board of governors and build a new school, but I think that that would be an unusual situation. It absolutely could not, however, do that for any other school, quite simply because it would not own the land and premises.

The Deputy Chairperson: So you are happy with it? We will reserve it. Yes, yes. I want to reserve as well.

Clause 21 provides for ESA to pay superannuation benefits to teachers. The clause transfers the responsibility for the payment of teachers' pension benefits from the Department to ESA. Stakeholders did not comment on the clause. Again, I ask the Department to comment.

Mr Stewart: Thank you, Chair. Again, this is one of the more straightforward clauses in the Bill: a very straightforward transfer of functions. The function of paying teachers' pensions currently rests with the Department. This is one of a group of operational functions that we feel would sit better with ESA than the Department, and the clause simply allows for that.

The Deputy Chairperson: OK. Thank you. So, should ESA take over responsibility from the Department for the payment of teachers' pension benefits? Will Members indicate that they are content with clause 21 as drafted?

Members indicated assent.

Mr Stewart: On foot of that clause, if it is included in the Bill, there would, of course, be a small piece of subordinate legislation to make provision for that. When Peter is finished modifying employment law, that is what he will be working on. We will bring that to the Committee in due course.

The Deputy Chairperson: OK. Thank you.

Clause 22 deals with the ancillary powers of ESA. The clause allows ESA, subject to other statutory provision, to do anything that appears to it to be conducive or incidental to the discharge of its functions. There was some commentary. ASCL wanted amendments to limit the authority that ESA has to undertake "anything" in order to protect the autonomy of schools. INTO suggested a change to the clause so as to limit delegation to schools and prevent the development of free schools or academy schools. NICIE suggested amendments that would add further definition to ESA's additional powers. Again, I ask the Department to comment.

Mr Stewart: The volume of commentary on this and the extent of the concerns expressed really did surprise us in the Department. This is a very standard clause, and it is one that Members will see in, I think, any Bill that comes before you to establish a new non-departmental body. It simply gives ESA a number of additional tools to allow it to discharge the main functions that are provided for elsewhere in the Bill.

For example, if you look in the Libraries Act (Northern Ireland) 2008, you will see, almost word for word, a very similar power for the Library Authority. If you even look in the Charities Act (Northern Ireland) 2008, you will find that the Charity Commission has a very similar set of powers. It is worth mentioning, in passing, that it is quite likely that all schools will have to be registered as charities with the Charity Commission. The Charity Commission will have much more significant powers to intervene in the running of schools than those proposed for ESA, but I mention that just in passing.

This is not the secret clause that some stakeholders fear it is that allows ESA to march in and take over schools. It is the clause that allows ESA to, for example, enter into agreements to order its own stationery, or enter into agreements with some provider to run the staff canteen at headquarters, or perhaps to take out a lease on headquarters premises somewhere, or to carry out or commission some research to better inform the discharge of its function — those sorts of things.

The limitations in the clause, I think, are very important. Many people who read it focus on the words "may do anything" and get rather concerned by that. However, I think that the words on either side of "may do anything" are very important. There is an important limitation at the beginning of the clause where it says:

"Except as otherwise provided by any statutory provision".

What that means is that ESA cannot simply use this as permission to do anything it wants. It cannot take onto itself functions that are assigned elsewhere in law. The function of managing schools, for example, is provided for elsewhere in statutory provision. The management of schools is for boards of governors: it is not for ESA. So, that clause does not permit ESA to intervene in the management of schools.

The words after, "may do anything" are equally important:

"may do anything that appears to it to be conducive or incidental to the discharge of its functions."

So, it is something that is added on to a function that is provided for elsewhere in the Bill. It does not allow ESA to create new functions for itself. That is a decision for the Assembly to take in primary legislation, not for ESA.

Miss M McIlveen: In relation to the comments that you made, Chris, on the Charity Commission, is it possible for you to give us a written briefing on the possible impacts of that?

Mr Stewart: Certainly, Michelle; happy to do that. In terms of timing, we are actually due to meet the Charity Commission next week, I think, to explore that very thing; to see what the implications are of the full commencement of the Charities Act (Northern Ireland) 2008. At this stage, we think that it is likely that all schools will have to be registered as charities with the commission. We will need to explore with the commission just what the implications of that are. They are likely to be in two particular areas. There will, probably, be a particular accounting regime and requirements that will apply to schools, which they will have to follow. It is probably less onerous than the accounting regime that applies to limited companies. So, it is not necessarily bad news for schools in that regard. However, there are also requirements in charities legislation around the group of people who would be known as the trustees of a charity, who are, in respect of a school, the board of governors. So that has potential implications. We need to explore with the commission exactly how schools will be affected by that. They are considerably more significant than any of the powers in the Education Bill.

Miss M McIlveen: I understand what you are saying. However, it does not mean that those organisations should not be concerned about the Education Bill as well.

Mr Stewart: Absolutely. However, they should be much more frightened of the 2008 Act.

Miss M McIlveen: That might be the case. However, that is not to underestimate their concerns in relation to this, either. It would be useful for us to have a paper on the impact of the 2008 Act in respect of schools.

Mr Stewart: Certainly. It might be a week or two before we can provide it. However, we will be happy to do so.

Miss M McIlveen: It is my understanding that some schools may be exempt from that. Obviously, that may have changed.

Mr Stewart: We think not at this stage. However, we need to take advice from the Charity Commission on that. My reading of the legislation is that it will apply to all schools. That is the initial view of the Charity Commission. A number of schools, particularly voluntary grammar schools, tend to be registered as charities already for tax purposes. Perhaps one of the ironies of this is that they might see the least difference out of all of it. The schools that might see most difference are controlled schools.

The Deputy Chairperson: You gave two examples, one being the 2008 Act, of where those clauses are normal. Are there any amendments or examples in the opposite direction of which you are aware?

Mr Stewart: Not that I am aware of, Chair. I have to say candidly that they do not usually strike fear into the hearts of stakeholders in the way in which they have done on this occasion. They would usually be seen simply as mechanistic clauses that would be included in any Bill to allow for some rather mundane functions to be discharged by a particular body.

The Deputy Chairperson: OK. I am going to move on to another part of the schools' —

Mr Lunn: I just want to ask Chris about NICIE's proposed amendment.

The Deputy Chairperson: I was just coming onto that. NICIE's amendment B would alter the clause to specify that ESA would have the power to encourage co-operative educational endeavours, including interfaith and multidimensional schools. Amendment C also alters the clause to allow ESA to assist boards of governors to convert their schools to interdenominational or interfaith schools in compliance with the procedure that is set out in the GB Academies Act 2010. Again, can you comment?

Mr Stewart: Those are lofty and ambitious policy aims that the stakeholders have set out, Chairman. Again, I think that they would be premature in terms of the Minister's consideration of the policy position. Perhaps the clause that allows ESA to buy its stationery would not be the right place in the Bill to include such provisions.

Mr Lunn: I think that Chris is being slightly flippant about clause 22 and the ability to buy stationery. Leave aside the fact that the suggested amendments are imprecise — we get that all the time. The people suggesting the amendments, particularly the Shared Education Programme and NICIE, seem to be being picked on as producing imprecise amendments. What do you expect? They are not Bill drafters. However, leaving that aside, the thrust of what they are suggesting is there for all to see. The existing requirement for the Department to encourage and facilitate integrated movement does not really include, I would have thought:

> *"the development of co-operative educational endeavors including interfaith and multi-denominational schools".*

To me, that is a departure from the existing requirement.

Mr Stewart: Indeed. You must forgive me if I appeared flippant earlier, but actually you are making the very point that I was trying to make. That would be a major change to functions and policy. It absolutely would be the antithesis of the description of the clause, which is "ancillary powers". It would be far from ancillary. It would be a core new function.

Mr Lunn: Well, it appears to it to be "conducive or incidental" — "anything that appears to it". That is the line that is terrifying everybody. I do not disagree. Maybe it is in the wrong place. Where would be the right place?

Mr Stewart: Probably clause 2.

The Deputy Chairperson: Should ESA have the power to do anything so as to fulfil its functions? I take it that we reserve. Any indication? OK. Should its powers explicitly include the development of interfaith and academy schools, or should they explicitly prevent academy and free schools?

Mr Stewart: If I may say so, I think that that particular amendment would be unconstitutional. It would seek to bind the hands of a future Minister in a future Assembly.

The Deputy Chairperson: So, are we happy to drop that amendment and move on?

Members indicated assent.

The Deputy Chairperson: Should those powers explicitly prevent further delegation to schools or should they do the opposite and prevent further centralisation? I do not think we need that. Either we are reserving judgement on the whole clause —

The Committee Clerk: Again, it is up to members. I think you want to reserve your position on whether ESA should have those additional powers.

The Deputy Chairperson: Do I have any indications from anyone? Should those powers explicitly prevent further delegation to schools, of should they do the opposite and prevent further centralisation?

Mr Stewart: I should respectfully point out to the Committee that the clause provides for neither the delegation nor centralisation of anything.

The Committee Clerk: What you are looking for is the Committee's views on proposed amendments A and D. ASCL was at one end and INTO was at the other.

Mr Hazzard: Reject the two amendments.

Miss M McIlveen: We need to look at this again.

The Deputy Chairperson: Mervyn, would you like to come in? Do you want to finish this clause?

Mr Storey: No, you finish it.

The Deputy Chairperson: We have given you a clear enough indication of the contentment of the Committee. We are on clause 23.

(The Chairperson [Mr Storey] in the Chair)

The Chairperson: I thank the Deputy Chair for looking after things. Apologies for not being here this morning; unfortunately, I had something else that I had to deal with.

Clause 23 allows ESA to undertake commercial activity as approved by the Department. Stakeholders did not comment on the clause. Chris, how much more different is this in relation to the current powers of ELBs and CCMS?

Mr Stewart: I do not think that there is an equivalent power for ELBs or CCMS, simply because of the age of the legislation that provides for those organisations. This is fairly common in more modern legislation, and Peter has just confirmed that CCEA has a similar power. If it were still the intention that the CCEA functions were going into ESA, that would have been the most obvious place for such a power to be used. Even without the CCEA functions, this is a useful power to give to any organisation that might well be able to develop some of its activities and functions. It could then market those in a way that was helpful to other organisations and make the best return on its investment in developing its own expertise.

The Chairperson: Do members think that ESA should be able to undertake commercial activities with departmental consent and so agree to clause 23 as drafted?

Members indicated assent.

The Chairperson: We move on to clause 24, which is on area education plans. The clause defines an area education plan as a document, including a map, which sets out, by area, an assessment of the education and youth service need and an assessment of the existing provision, with proposals to meet the need. There was a lot of commentary, and we have proposed amendments listed as a, b, c and k. We have ones from the shared education programme. NICIE suggests amendments that seek to require area plans to include measures to promote sharing, collaboration and integration. Chris, do you want to comment?

Mr Stewart: This is the first of the area planning clauses, and its purpose is relatively simple. It is simply to set out the concept, or the definition of the concept, of an area education plan. You have summarised it neatly. It is intended to be a statement of existing provision right across education, covering not only schools but youth services and early years. It is a statement of need and an analysis of any difference between the two. Chair, would you like me to go through the amendments one by one?

The Chairperson: Yes.

Mr Stewart: There are two difficulties with proposed amendment a. First, the clause is already comprehensive. It is meant to cover and does cover all types of education provision. As we have said about a number of the suggested amendments to earlier clauses, this one is a little premature. The Minister is not yet in a position to conclude what legislation might be required, either in area planning or in any other field, to advance shared education, nor does he feel that he will be able to do so until he receives and is able to consider the report of the advisory group on shared education. So amendments a and b are, I am afraid, premature. The same applies to amendment c, some of the wording of which is also difficult because it is not precise enough.

Proposed amendment d suggests a level of detail that we do not think appropriate for primary legislation. There is provision, not in this clause but elsewhere in this part of the Bill, for the Department to issue guidance and/or subordinate legislation on the content of area plans and the process for area planning. So, if we need to be more precise and more specific about what should be in a plan or how a plan should be drawn up, we think that that is the place to do so rather than in the Bill.

We understand where the proposer of amendment f is coming from, but it is not the same starting point as the Minister. The starting point is the needs of children and young people rather than the current disposition or, indeed, the needs of facilities. So the proposed definition of area really does

not fit with that. It should not simply be a line drawn around a particular group of providers. Rather, it should be a line drawn around particular communities with shared needs, which would have shared or common access to the delivery of education. The phrase that I have used before is that we are looking for something rather more sophisticated, perhaps, than the current area planning exercise, in which we look only at political boundaries. We would follow, or parallel, a concept that members will be more familiar with in economic planning, in which you see travel-to-work areas. We envisage using a concept such as travel-to-education areas. We think that a much more sensible starting point is natural communities or groups of communities that could be served by particular groups of providers.

We think that proposed amendment g is simply unnecessary because there is only one planning organisation — ESA — so it will automatically ensure that its plans for different areas are coherent and take account of one other.

We understand the thinking behind proposed amendment h. Depending on the wording, however, that amendment may take us beyond the legislative competence of the Assembly. We cannot legislate for outside the jurisdiction of Northern Ireland. The same applies to proposed amendment i.

We think that proposed amendment j is impractical. It would be asking ESA to review decisions taken by the Minister of Education, and that is getting the relationship the wrong way round. ESA will produce plans and development proposals, but the Minister of the day will make decisions on them.

We feel that proposed amendment k, as with some earlier proposed amendments on sharing and collaboration, is premature. Until the Minister and Executive have an opportunity to settle their policy position on the need for legislation, the Minister does not feel it appropriate to include an amendment such as that in this Bill.

Mr Lunn: Proposed amendment h calls for:

"a requirement for ESA to consider cross-border educational providers".

You say, Chris, that that is outside the legislative competence of the Assembly.

Mr Stewart: It may be, Trevor. I would not want to be as definitive as that.

Mr Lunn: We have had a discussion about a border corridor and the needs of border communities. In some cases, it may be desirable to come to some arrangement with schools or authorities on the other side of the border, and vice versa.

Mr Stewart: Absolutely. The Minister strongly supports that.

Mr Lunn: That may not be within the legislative competence of the Assembly, but is there any problem with the Bill noting that possibility and, perhaps, placing a requirement on ESA just to consider cross-border educational co-operation?

Mr Stewart: That may be possible. Obviously, the Minister clearly supports the sort of initiative that you refer to. For many years, it has been commonplace for the planning of health services to take account of services just across the border. However, there is a difference between doing something and legislating for something. The Committee and the Department would need to be careful, in framing an amendment or provision of that sort, to ensure that we remained within the legislative competence of the Assembly. We cannot legislate for something to be done outside Northern Ireland.

Mr Lunn: Would the word "consult" not come into it somewhere rather than "consider"?

Mr Stewart: Possibly. Trevor, I am not saying definitively that it is impossible to legislate in that way. I simply advise caution in taking forward such an amendment.

Mr Lunn: Can we get a wee bit more advice about that?

The Chairperson: Who would you want the advice from, Trevor?

Mr Lunn: On the question of legislative competence, we obviously cannot legislate for anything that happens in the Republic of Ireland, and I would not want to suggest that. However, co-operation could

be the most desirable and, perhaps, the only way of keeping a border school open or providing the best possible educational opportunities for a small community along the border. That is worth considering. It is really a question of to what extent it could be incorporated in the Bill. Would the Bill's draftsmen or experts in the Department have further suggestions on that?

Mr Stewart: If it would be helpful, Chair, the Department will seek legal advice on what may be possible. It will raise questions that would need to be worked through carefully. If, for example, it is possible to introduce a duty to consult providers in another jurisdiction, the question that the legislative draftsmen may ask me is this: what if they do not feel that that consultation has been adequate? What remedy would a provider in another jurisdiction have, if it did not feel that ESA had discharged that statutory function? In contrast, we know exactly what the remedy here would be, if a provider in this jurisdiction felt that ESA had not discharged the function. I do not offer that as a reason for not legislating in this way, but simply as an example of one of the areas that would need to be worked through very carefully before attempting to do so.

Mr Lunn: It might be a question for another day.

Mr Hazzard: Just on the back of that, I take Chris's last point. I just wonder about the health situation that you mentioned, Chris. Am I right in thinking that the Altnagelvin cancer unit was a result of cross-border co-operation? Can we learn something from that? I know what you are saying about consultation, but we may be able to add in something.

Mr Stewart: There are examples in education. I am simply more familiar with the health examples. Many years ago, there was an initiative called Cooperation and Working Together (CAWT). However, for many years, the provision of acute hospital services in both jurisdictions has been planned with consultation and close co-operation between the providers and commissioners in either jurisdiction because it makes absolute sense. Hospital provision is extremely expensive, and it is important that both jurisdictions are able to maximise the efficient use of their resources, and that is commonplace. However, I am not aware, at any stage, of any legislative provision requiring that to be done. It is done simply because there is no legal impediment to doing it, and it makes common sense. The Minister, as you know, strongly supports the suggestion that there should be more co-operation between education authorities in either jurisdiction.

Ms Boyle: I share the concern raised because there is a particular problem in my area. The area of the South less than a mile from Strabane has a particular lack of controlled schools. Every year, people from the southern side come to me seeking to access education for their child in the North because of the lack of provision near their home in the South. It is a big issue for the Protestant community in the South. So I have issues with this clause, and I do not think that I could support it being taken forward without further clarification.

The Chairperson: Michaela is right. There is always the risk that, the moment we start to discuss something like this, it becomes a political debate about what is being done alongside another jurisdiction. There are, however, practical implications, as Michaela, rightly, referred to. Those same implications have been raised with me by a number of schools in the Republic. The issue that they have is that their schools are in small, isolated Protestant communities.

We still await the outcome of the survey on this issue. The Minister attended a North/South ministerial meeting on Thursday, and his statement is due next week. So we will hear whether the survey has been completed, or at least get an update. It may be useful for us to wait to hear what is said then.

There is a practice that currently operates between the two jurisdictions, just as there is with health. It depends whether we need to get into the area of legislation because, as soon as we do that, we create other problems and barriers that co-operation might not be able to get round.

Mr Stewart: You are absolutely right, Chair. The Minister is looking forward to the results of that survey, which will be discussed at the North/South Ministerial Council (NSMC). He will draw conclusions from that on what, if anything, further needs to be done. Given that the work is at that stage and being looked at specifically by the North/South Ministerial Council, the Minister's view might be that it may be a bit premature to move directly into legislating in this way. That is aside from any political concerns that I might throw up. It is not that the Minister is setting his face against North/South co-operation — it would surprise people if I said that. However, he is, rightly, saying that a range of policy issues and, perhaps, some technical and legal issues need to be worked through before anyone should rush to legislate in this area.

The Chairperson: Individual area plans are highly controversial and should not be the subject of our discussion today. However, it is for the Committee to make some determinations on the proposed amendments. Should the Bill require area plans to include a shared education definition or shared education initiatives? Should the Bill require ESA to promote co-operation between schools? Should the Bill require ESA to maximise opportunities in area plans for integration? Should a definition of an area plan be included in the Bill? Should the Bill require area plans to comply with the sustainable schools policy or the Bain report? That would apply more to the sustainable schools policy because that is a current policy of the Department. Should the Bill require all area planning to date to be set aside and started again after ESA is established? It would be interesting if that one got to the table. Should the Bill require area plans to take account of cross-border education? It is possible that clause 24 could cover a range of issues, but if members are content with having at least set out the issues, they must then decide whether any of these proposed amendments should form part of our formal clause-by-clause scrutiny.

The Committee Clerk: Chair, with informal clause-by-clause scrutiny, we want members, if possible, to indicate their views on the clauses. Members indicated earlier that they might want to reserve their position. That is fine. However, members could, where they feel able, set out whether they think that a proposed amendment is great or terrible, or whether they will reserve their position. If they do not do that, it will make it very difficult to do formal clause-by-clause scrutiny because there are, potentially ,220 amendments, and I do not think that the Committee will pursue all, or even very many, of them. Rather, it will want to pursue a few critical ones.

Mr Stewart: May I offer a general comment that I hope will help members with that batch of proposed amendments? In this and related clauses on area planning, we have tried to set out how the area planning process will work, the role of ESA and the role of the Department. A number of the proposed amendments attempt to secure a particular outcome in the area planning process, and it is our view and the Minister's view that primary legislation is not the right place to try to secure a particular outcome — that is in the area plans.

As I said earlier, it is suggested that the Department have the power to make regulations and offer guidance on the content of plans and the planning process. That is the level at which you start to shape the content and the outcome of plans, but we think that it is overly ambitious on the part of some stakeholders to try to determine the outcome of plans in the enabling provisions that allow for the planning process.

The Chairperson: Are there any comments? Do members want to reserve their position on clause 24?

Members indicated assent.

The Chairperson: Clause 25 is on the preparation and revision of plans. The clause provides for ESA to prepare and revise area education plans and to submit those to the Department for approval. The proposed amendment from NICIE and the Integrated Education Fund seeks to require the Department to ensure that the area plans provide for the development of integrated education and that consultation with parents is undertaken to that effect. I suppose that NICIE and the Integrated Education Fund are rehearsing some of the suggested amendments to clause 24. My concern is with clause 25(3):

> *"The Department may approve a plan or revised plan submitted to it either without modifications or with such modifications as it thinks fit."*

So the power for area plans rests with the Department as opposed to ESA.

Mr Stewart: That is a fair summary, Chair. This is quite deliberate. It was the Minister's policy intention that ESA should do the heavy lifting but that decisions on area plans and individual development proposals would remain with the Minister.

The Chairperson: We clearly have a concern with this as it is currently drafted because it gives an unfettered power to the Department on a very sensitive and important issue. I appreciate what you are saying, which is that the heavy lifting is done, so all the information is collated and a plan is put

together and sent to the Department. However, irrespective of who is in control of the Department at a given time, he or she could change or not change the shape of an area plan.

Mr Stewart: That is absolutely correct.

The Chairperson: We have no idea of the criteria that the Department would use to judge, score, modify, reject or amend a plan, and that would be an issue. Certainly, as far as my party members are concerned, we are concerned about the way in which clause 25 is drafted.

Mr Stewart: You are absolutely right, Chair. Members will have to come to a view on whether that is the right way to approach this. However, it is similar to the position of today. Although we do not have a formal process for area planning — there are no specific provisions in education law — at present, plans are prepared by the education and library boards and CCMS and submitted to the Minister, who has the final say. In recent days, he indicated his displeasure with the rate of progress and the direction in which some of the plans are going. So, in that sense, it is no different. The position of individual development proposals is absolutely no different. At present, it is the Minister's decision in law, and it is proposed that that would continue to be the case.

The Chairperson: Will you clarify this for me, Chris? Would ESA take precedence and would development proposals, as we knew them under the legislation, cease to exist?

Mr Stewart: No. They will still be there. When we were developing the policy and legislation on this, some argued that we should go all the way: an area plan would identify the particular schools to be built, closed or moved, and there would be no need for development proposals. Planning would simply be top-down — the Department and the Minister would decide where all the schools would be.

The Minister did not feel that that was a feasible or an appropriate way to carry out area planning because it does not recognise the reality of education, which is that more than 600 of our 1,200-odd schools are voluntary schools. Those schools did not arise top-down; they arose bottom-up because communities, people and bodies decided to found a school. So we have a very strong voluntary tradition in education. It is sometimes felt that the Department does not value that. In fact, we do. We recognise that over half of our schools are voluntary schools, and that is one of the strengths of our education system. Therefore, we need to provide for voluntary schools in the future. If you hold on to the concept of voluntary schools, you have to hold on to the concept of development, and the legislation allows for that.

The difference would be this: at present, a development proposal is submitted to the Department by an education and library board; and the board and the Department analyse its effect on other schools, against the information that we have on need and against the range of policies that the Department has in place, such as the sustainable schools policy. However, all of that is informal. This puts it on a formal basis and adds an additional factor. So a development plan, as well as being assessed against all of those other things, will be assessed against the area plan. If it is compatible with the area plan, on it goes through the process that you are all familiar with. If not compatible with the area plan, it does not go through that process. So an area plan performs two major functions: first, it sets out in broad terms the assessed need for a particular community and, secondly, it acts as a filter for development proposals. Development proposals that are not compatible with the plan are filtered out.

Fundamentally, education provision will still contain that very significant element of bottom-up voluntary provision, and that is reflected in the development proposal process.

The Chairperson: What do members think about clause 25? Should the Department have the power to revise area plans? Do members support the amendment, tabled by NICIE, preventing departmental approval of plans unless they provide for the development of integrated education and ESA has provided evidence that consultation with parents has taken place?

Mr Lunn: The departmental response to the NICIE proposal refers to "shared" education, and we await a definition of that. NICIE's suggested amendment refers to "integrated" education. I think that we are all pretty clear about what that means, so there is a slight disconnect between the proposal and response.

Mr Stewart: The wording of the response is quite deliberate. NICIE, in suggesting a particular legislative approach to integrated education, is anticipating policy decisions that have not yet been

made. That may or may not be the decision of the Minister, the Executive and the Assembly in due course. It will be taken in the context of policy decisions on shared education, which, Trevor is quite right, is not yet precisely defined. In the terms of reference that the Minister set for the advisory group, there is a broader concept than integrated education that would include integrated education. So NICIE has picked out one potential approach and one potential flavour of integrated education and suggested that we should legislate for it. The Minister is simply not ready to do that yet.

Mr Lunn: Can we reserve judgement on that clause?

The Chairperson: Are members content that we reserve judgement on clause 25?

Members indicated assent.

The Chairperson: Clause 26 is on the revocation of plans. The clause allows ESA to revoke an area plan and requires it to do so, if so directed by the Department. There was no commentary from stakeholders, but I will just repeat what I said about clause 25, which concerns the power of the Department. We do not want to give the Department too much power in any of these things.

Mr Stewart: At least we are being consistent, Chair.

The Chairperson: Yes. Are members content that we reserve judgement on clause 26?

Members indicated assent.

The Chairperson: Clause 27 places a duty on ESA to publicise and carry out a consultation before submitting new plans or revising existing plans for approval by the Department. ESA must consult district councils affected by the area plan, and there is some commentary from stakeholders. We have a proposed amendment from Campbell College, which would require ESA to consult boards of governors of schools affected by the area plan. A proposed amendment from NICIE, amendment b, suggests that the consultation on the area plan should have community focus, including district councils, young people and community audits.

There is quite an overlap with clause 28, so I suggest that we discuss the two together. Clause 27 covers publicity and consultation, and clause 28 covers the involvement of relevant bodies. Campbell College has raised the issue about consultation with the board of governors. That could be generic across the piece, depending on what sector a school is in. In some sectors, the trustees will probably want to be consulted and then bear the responsibility of informing their board of governors. If it were made a general duty across all schools, that would, I think, be sensible. It could be copper-fastened by ensuring, as clause 28 begins to make an arrangement for, that:

> *"It is the duty of ESA to make arrangements with a view to securing that the sectoral bodies and the persons mentioned in subsection (2) are involved in and consulted on".*

So the question is this: who are the sectoral bodies? They must, I think, be defined. Do they have to be defined in the legislation? Say, for example, that the current situation pertained, in which the only sectoral bodies that exist are CnaG, NICIE and CCMS, so, technically, they are the only bodies that would be consulted. We would not consult the Governing Bodies Association (GBA), and the Bill proposes, for example, a sectoral body for the controlled sector.

Mr Stewart: All the recognised sectoral bodies would be involved. If the Bill passes into law, we will no longer have CCMS, but the intention is that there will be a sectoral body for Catholic education. The Minister does not propose to specify sectoral bodies in the Bill, but all the recognised and funded sectoral bodies will be involved in the area-planning process.

Let me sum up the intention behind clauses 27 and 28. Members might want to envisage this as three concentric circles, within which we try to answer the question of who should have a role in area planning. We see three levels or modes of involvement. The broadest level, or the outermost concentric circle, is provided for in clause 27. That is the broadest possible consultation. It includes district councils or other interests beyond the immediate education family, but for whom education provision and planning is obviously very significant, and they should have an opportunity to be consulted and give their views about area planning.

The second circle is those who have a much stronger and more direct interest in education. There should be a specific requirement on ESA to consult them. The broad range of persons and bodies are identified in clause 28(5): consumers of education; providers of education; parents; staff of schools; and boards of governors.

Then, there is the innermost circle which, if I may oversimplify, includes those who should be around the area-planning table when the area plans are being drawn up. That is provided for in clause 28(1) and 28(2). That gives a very clear role to the sectoral bodies and other bodies representing the providers of youth services or educational services.

Stakeholders, particularly the Youth Forum, drew attention to the difference between those persons or bodies that ESA has a duty to involve and those that ESA has the power to involve. I explained that the reason for that is purely one of practicality. It is because a duty is about more than consulting; it is about consulting and involving. Although we think it is practical to have a duty to involve and consult all the sectoral bodies, it is not practical to have a duty to involve and consult all children and young people or all school governors. However, ESA should have a power to do so, and should have an effective means of ensuring that children and young people, staff of schools, other providers and boards of governors have an effective voice and an input around the area-planning table. So, there should be school governors, parents and children and young people there, but it is not practicable to have an absolute duty to involve all of them.

The Chairperson: Any comments?

There is obviously the one that continues to do the rounds on this issue. If you take one of the three circles that you referred to, we will always worry about inner circles, which create problems and difficulties.

Mr Stewart: Perhaps I should have chosen a different analogy.

The Chairperson: I hope that there is not an inner circle in the Department.

Mr Stewart: I can assure you that I am not in it. *[Laughter.]*

The Chairperson: Does everybody come to the table on the same basis? That is the fundamental issue that has beset our system for years, and it is about more than just the matter of who pays the teachers. Sometimes, I think that there has been a mistake made and it seems that it is just all about who is on the payroll. It is about the issue of who owns the school.

Chris, you have heard this repeated time and again here: there are those who believe that, because they are de facto, in legal terms, the owners or the leaseholders of a property, they have a greater right to be able to determine whether school A or school B exists. We see that being played out at the moment in certain parts of the country with respect to area plans. Omagh is a prime example. On the one hand, a board can say, "You will have to do A, B and C and move on to Lisanelly"; while, on the other hand, sectors that have different ownership arrangements are hearing, "We encourage you" or "It is the only show in town" and "There is really not a big lot we can do if you decide not to do A, B and C". Fundamentally, is that going to be any different, irrespective of whether there is a single employing authority? The phantom is now a reality because of the issue of ownership. I know that you are getting very nervous that I am straying back into thoughts of ownership in the controlled sector. That has been an issue. I know —

Mr Stewart: Chair, we have provisions for a holding body that we can —

The Chairperson: Just to really worry you, I have to say that I read policy paper 20 again. I am sure that you will be delighted to hear that, Chris.

Mr Stewart: Yes, Chair. It has been some years since I have read it.

The Chairperson: Where do clauses 27 and 28 leave us with the three concentric circles?

Mr Stewart: I think that I can assure you on those points. If you are tempted to request us to bring back the proposals for a holding body for controlled schools, we could, of course, dust them off at any stage and bring them forward for your perusal.

I do not think that employment or ownership will make any difference to the planning arrangements for schools. As you rightly said, ownership is very significant. Ownership of schools conveys responsibility and authority around things like governance, management and the appointment of boards of governors. However, the one area where it does not convey an advantage is in planning. It would, of course, be the Minister's hope that, with Lisanelly and any planning matter, we could arrive at a consensus, where all the parties concerned would have a shared view of the best way forward and proceed on that basis.

The Department has the power — I hesitate to describe it in those terms — to close any school, irrespective of who owns it. There is a specific power to do so in article 14 of the 1986 Order, which would be re-enacted in this Bill. The means of doing so would be that if the Minister of the day felt it necessary to close a voluntary school or a grant-maintained integrated school, he would simply direct the education and library board today, or ESA in the future, to bring forward a development proposal for the closure of that school. One would hope that we would never be in a situation where that was done in the face of opposition from the owners of the school. However, if it were necessary to do so to give effect to an area plan, the legal power is there.

The Chairperson: It is there currently. Is that under article 101?

Mr Stewart: No. It is under article 14 of the 1986 Order. The Department can close any school. The corollary of that is that we cannot open any school. A voluntary school is, by definition, a voluntary school, and it emerges from a person or body deciding to establish a school. However, we can close any school.

The Chairperson: There are no further comments from members on clauses 27 or 28. I think we should reserve our position as there are issues.

Mr Kinahan: Reserve.

The Chairperson: Clause 29 requires ESA to take account of guidance issued by the Department on the production of area plans. The Community Relations Council suggested an amendment that would require ESA to take account of departmental guidance on area plans, which would include a duty to promote shared education. That is similar to what we have discussed.

Are there any comments from members on clause 29. Chris, do you want to comment on the suggested amendment from the Community Relations Council?

Mr Stewart: The wording of the amendment seems slightly out of kilter with the commentary the council provided for it. As we have said about a number of the previous amendments, we feel that it is premature to consider legislating in advance of the Minister having an opportunity to receive the report on shared education.

The clause is the embodiment of what I was saying earlier. The Department does not see the need to try to specify the outcome of the area-planning process in the Bill, but it does feel that it is important to have the opportunity to influence how ESA operates, if necessary, in the future. So, the opportunity is there to produce guidance, and the next clause provides the opportunity to produce subordinate legislation, if we think it is necessary to do so. That is to reflect the fact that policy will evolve. Were there to be a successor to the Bain report or to the sustainable schools policy, the Minister of the day might want to reflect such changes and make sure that ESA does so in the area-planning process. That is the purpose of the clause.

The Chairperson: Does the legal position of guidance remain as it is? My understanding is that the current legislative position is that it is guidance and that you must ensure that you have taken due consideration of that guidance, but that a contrary decision could be made by ESA on a particular area plan.

Mr Stewart: The position of guidance remains in law, and, as members will be familiar with, it is sometimes referred to as "soft law", but it does not have the force of law. However, in this particular situation, where we are talking the relationship between the Minister of the day and ESA — an arm's-length non-departmental public body — the relationship is one of accountability. There will be a requirement and an expectation on ESA to deliver the policies of the Minister of the day and, if needs

be, the back-up of article 101 is there to direct ESA, should the Minister of the day feel it necessary to do so. In that context, it has to be acknowledged that guidance may carry a bit more force than it would, for example, in the relationship between the Department and a school.

The Chairperson: Should we reserve our position?

Mr Lunn: Why does it state "take into account" rather than use some of these other phrases that we love so well, such as "have regard to"?

Mr Stewart: Trevor, I would again have to defer to the Office of the Legislative Counsel on that. That is the wording that was thought most appropriate to describe how guidance would be used.

Mr Lunn: Does it give it more weight?

Mr Stewart: I do not think so.

The Chairperson: OK. Do we reserve our position?

Members indicated assent.

The Chairperson: That takes us to clause 30, "Regulations". The clause allows the Department to make regulations to control the form and content of area plans; the procedures to be followed in the production of an area plan; and on the procedures for consultation. No stakeholders commented, but I have the same concern about the regulations being subject to negative resolution.

Mr Stewart: Peter reminds me that it is the negative resolution procedure, yes, which would be the norm.

The Chairperson: Do members want to rehearse the negative resolution procedure?

Mr Lunn: Please, no.

The Chairperson: OK. Do we reserve our position?

The Committee Clerk: Are you content that is it subject to —

The Chairperson: Well, negative resolution simply means that the regulations must be brought before this Committee and the Assembly.

The Committee Clerk: They would not go before the Assembly unless someone prayed against them.

The Chairperson: Yes, but ultimately they would be here. The regulations could not be laid without them coming to the Committee. Is that right?

Mr Stewart: Correct.

The Chairperson: Are we happy to reserve our position?

Members indicated assent.

Ms Boyle: I am content.

Miss M McIlveen: Again, it relates to area planning. If we have concerns about clauses in relation to area planning, I am not sure that we can then agree to clause 30.

The Chairperson: Yes, because they are interrelated. OK. We reserve our position.

Clause 32 is relates to the transfer of assets, liabilities and staff —

The Committee Clerk: Clause 31.

The Chairperson: Did I miss one? I am fairly going well today.

Mr Stewart: You missed a fairly important one, Chairman. *[Laughter.]*

The Chairperson: Oh, there would be no ESA if we missed this one. That is not me trying to be mischievous. Clause 31 dissolves the education and library boards, the Council for Catholic Maintained Schools, the Staff Commission for Education and Library Boards and the Youth Council for Northern Ireland. I think that we will reserve our position on this clause as well. OK?

Members indicated assent.

The Chairperson: Clause 32 is the one that I love. It concerns the transfer of assets, liabilities and staff. It applies to schedule 4, which allows for the transfer of assets, liabilities and staff from the dissolved bodies to ESA. We will deal with schedule 4 later. The clause also applies to schedule 5, which deals with the transfer of assets, liabilities and staff, CCMS and ESA. We propose to deal with schedule 5 later. The clause also applies to schedule 6, which deals with the transfer of staff from the Department to ESA. Again, we will look at schedule 6 later.

No comments were made by stakeholders. Any comment from you, Chris?

Mr Stewart: Very little, Chair. The clauses — perhaps not the schedules — are relatively straightforward. Clause 31 and clause 32 make a pair. The effect, quite simply, as is apparent from the clauses, is to dissolve the eight existing organisations and make provision by means of schemes to transfer the staff, assets and liabilities of the dissolved organisations to ESA.

The Chairperson: Do we have a breakdown yet?

The Committee Clerk: Not yet.

The Chairperson: The Bill refers to "certain assets and liabilities of CCMS". It also refers to "certain staff from the Department to ESA." We have not seen a breakdown of that as yet, although "staff" has been referred to.

Mr Stewart: It is not available just yet, Chair. My colleague Paul Price is working on that. We hope to have information with the Committee in due course. My colleagues in the Department, including the ESA implementation team, have said that they want to ensure that the information that we provide is accurate and up to date. It is a fairly involved exercise to specify all the assets and liabilities. If they do it too early, there is the possibility that something could change between now and the appointed day. They are cognisant of the Committee's request for information. We will bring that to you as soon as we can.

All CCMS's assets and liabilities will transfer somewhere; it is just that they will go in two different directions. Some of the assets will return to the Church because they were not publicly funded, but all the assets and liabilities that were publicly funded will go to ESA.

The Chairperson: We had reserved our position on this. A paper was done — my wonderful filing system means that I cannot get my hands on it — that set out the terms and conditions under which transfers took place. If I remember correctly, we raised an issue about the law changing around 1971.

Mr Stewart: Is it about the famous clawback arrangements, Chair?

The Chairperson: Yes, the clawback arrangements. Maybe it would be worthwhile bringing that back to consider.

Mr Stewart: It might actually be simpler than that. Those arrangements would mainly affect the capital funding of schools. Of course, it is not schools that are transferring; it is the headquarters' assets of CCMS. Therefore, it is simpler. If an asset was publicly funded, it transfers to ESA. If an asset was funded by the Church, it might revert to the Church. If ESA felt that it still needed that

asset, its ownership would revert to the Church but ESA might lease it from the Church if it were needed for the ongoing delivery of a service. The Minister is absolutely clear that the publicly funded assets of all those organisations will remain in the public sector and will transfer to ESA.

The Chairperson: Members, I think that we will reserve our position until we see the information that comes from the Department about what is transferring. OK?

Members indicated assent.

The Chairperson: The plan was that we would stop at this point and suspend the proceedings until 9.30 am tomorrow in the Senate Chamber, when we will resume at clause 33.